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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re:

Amendment of 73.202(b)
Table of Allotments
FM Broadcast Stations
(Wallace, ID and Bigfork, MT)

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Docket No. 98-159

To: The Commission

Application for Review

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Summary of Argument

The Decisions unlawfully granted Alpine Broadcasting's 1998 Petition for Rulemaking, which proposed to move unbuilt KSIL-FM from an underserved area of Idaho to a well-served area of Montana even though, inter alia, it is factually undisputed that Alpine defaulted on its evidentiary burden of producing a required "Gain/Loss Study" for its proposed change of community.

The Decisions also erred in reallocating KSIL-FM to a well-served area in Montana, despite the undisputed fact that at least 150 persons in KSIL-FM's Idaho service area would be left with ONLY ONE FULLTIME AURAL SERVICE, contrary to both Section 307(b) of the Act and FCC precedent.

The Decisions unlawfully granted Alpine's 1998 proposal to move its unbuilt "Class C" station from Wallace, ID to Bigfork, ID, even though Alpine never built a "Class C" facility at Wallace, ID, and thus, three years later, there was no "Class C" facility at Wallace, ID to be reallocated.

Finally, the Decisions unlawfully authorized Alpine effectively to change its rulemaking proposal after the comment and counterproposal deadline, so as to authorize the move of a "Class C-2" facility from Wallace, ID to Bigfork, MT as a "Class C" facility, in contravention of FCC rules and without affording the public any opportunity to comment on Petitioner's change to its 1998 rulemaking proposal.

The Decisions should be reversed and set aside.

Application for Review

Pursuant to 47 CFR 1.115 ^{1/}, Bee Broadcasting, Inc. ("BBI") submits this Application for Review of the staff's Memorandum Opinion and Order, MM Docket No. 98-159, released February 8, 2002 (MO&O), which refused to grant reconsideration of the staff's Report and Order, RM-9290, released May 11, 2001 ("R&O"). ^{2/} The MO&O and the R&O (collectively the "Decisions") granted a Petition for Rulemaking filed in 1998 by Alpine Broadcasting, L.P. ("Alpine"), to move its unbuilt "Class C" FM facility from Wallace, Idaho to the unincorporated community of Bigfork, Montana. Following the filing of BBI's Petition for Reconsideration, Alpine sold its Idaho FM facility (KSIL-FM) to Anderson Broadcasting Company, which owns radio stations near Bigfork, MT.

Questions Presented for Review

1. Whether the Decisions unlawfully held that Alpine's proposed move of KSIL-FM from an underserved area of Idaho to a well-served area of Montana is in the public interest even though, inter alia, it is factually undisputed that Alpine defaulted on its evidentiary burden of producing an appropriate "Gain/Loss Study" for its proposed change of community.
2. Whether the Decisions departed unlawfully from FCC precedent in reallocating KSIL-FM to a well-served area in Montana,

^{1/} This Application for Review is timely filed within 30 days of the February 8, 2002 Public Notice in this proceeding..

^{2/} BBI is "aggrieved" under Section 1.115(a) of the Commission's Rules inasmuch as BBI owns broadcast stations that serve Bigfork, MT; and it participated in the proceeding below.

despite the undisputed fact that at least 150 persons in KSIL-FM's Idaho service area would be left with ONLY ONE FULLTIME AURAL SERVICE.

3. Whether the Decisions unlawfully granted Alpine's 1998 proposal to move its unbuilt "Class C" station from Wallace, ID to Bigfork, ID, even though Alpine never built a "Class C" facility at Wallace, ID, and thus there was no "Class C" facility to be reallocated.

4. Whether the Decisions unlawfully authorized Alpine to change its rulemaking proposal, after the comment and counter-proposal deadline, so as to authorize the move of a "Class C-2" facility from Wallace, ID to Bigfork, MT as a "Class C" facility, in contravention of FCC rules and without affording the public any opportunity to comment on the rulemaking change.

Factors Warranting Review

1. The Decisions are in conflict with Commission rules, case precedent and established FCC policy.

2. The Decisions involve FCC policy that may need clarification or amplification in situations, like here, where a rule-making petitioner repeatedly engages in regulatory gamesmanship.

Background

In February 1998, Alpine held a Class C permit to build KSIL-FM, Wallace, Idaho, a facility that proposed to serve substantial "white and gray" areas of sparsely populated Idaho. While a factual background of this proceeding is presented in the

R&O (at para. 4-5), additional facts are recited here to provide a complete record in this bizarre proceeding.

Rather than build its Class C facility at Wallace, ID, Alpine filed a Petition for Rulemaking that sought to move its Class C facility from an underserved area of Idaho to a well served area of Montana. After BBI filed an Opposition to the Petition for Rulemaking that detailed the significant "white" area that KSIL would abandon in Idaho should the "Class C" facility be re-allocated to Bigfork, MT, Alpine filed a "one-step" application to downgrade its unbuilt Idaho station from a Class C to a Class C-2 facility.^{3/} The purpose such gamesmanship was, as admitted by Alpine, to improve its rulemaking case by reducing the amount of "white and gray area" that would be abandoned by its proposed change of KSIL-FM's community of license from Wallace, ID to Bigfork, MT.^{4/}

Moreover, after a C-2 permit was granted and Alpine constructed the downgraded KSIL facility in Idaho, no notice of the downgraded (Class C-2) status of KSIL was given by Alpine in this rulemaking proceeding, which remained (to the very release of the R&O) a proceeding that proposed to reallocate a "Class C" facility from Wallace, ID to Bigfork, MT. Furthermore, no "public notice" was ever given by the FCC that Alpine's rulemaking proposal (to delete channel 246C from Wallace, ID) had been changed after the

^{3/} No notice of the filing of that downgrade application was ever filed in this rulemaking proceeding.

^{4/} See, e.g., "Response to Supplemental Notice," filed by Alpine on July 12, 2000. at para. 16.

established deadline for filing of comments or counterproposals. Thus, no opportunity for public comment ever was provided by the FCC for the changed rulemaking proposal.^{5/}

Argument

I. THE DECISIONS UNLAWFULLY RELIEVED THE PETITIONER OF ITS EVIDENTIARY BURDEN OF PROOF

It is incontrovertible that the staff relieved the Petitioner in this rulemaking proceeding of its evidentiary burden of proof; indeed, the NPRM, supra, required Petitioner to provide an appropriate "Gain/Loss" study for its proposed reallocation of KSIL-FM from Idaho to Montana.^{6/} Further, the NPRM expressly stated that the Petitioner's failure to do so "may lead to denial." Id. at Appendix, para. 2.

First, Alpine failed to submit evidence regarding the Bigfork, MT "gain area" on the basis of predicted minimum Class C facilities, as required by the FCC. See Greenup, KY, 6 FCC Rcd 1493, 1497, note 7 (1991). Second, Alpine erroneously failed to submit evidence on the predicted Wallace, Idaho "loss area" based on the downgraded C-2 facility that Alpine ultimately constructed at Wallace, ID.

^{5/} Furthermore, Alpine's assignee, Anderson Broadcasting Company, has filed within the last several weeks an untimely Form 301 application for a permit to construct a Class C-1 facility at Bigfork -- a channel that does not exist, inasmuch as the rulemaking proceeding here being challenged by BBI authorized a Class C facility, not a Class C-1 facility, at Bigfork, MT. See 47 CFR 73.203(a).

^{6/} Both of the Decisions so found. See MO&O, supra, at para. 4; see also R&O, supra, at para. 6-9.

In short, Alpine had tried to "game" the rulemaking proceeding by downgrading its Idaho facility, so as to minimize the loss of service to underserved areas of Idaho. Yet, rather than either (i) dismissing Alpine's petition because of Alpine's failure to carry its required burden of proof, or (ii) requesting Alpine to supplement its evidentiary showing, as the FCC normally does,^{7/} the staff arbitrarily and unlawfully departed from its usual practice and conducted the required Gain/Loss study on Petitioner's behalf.^{8/}

In its MO&O on reconsideration, the staff attempts to excuse its unexplained departure from precedent by claiming that Alpine's evidentiary failure "was not fatal to this proposal." Id. at para. 4. The staff contends (id.) that to have required Alpine to prepare and submit its own evidentiary showing "would have delayed" the proceeding and served "no useful purpose." Charitably speaking, that rationale falls far short of the "reasoned decisionmaking" required of all FCC actions.^{9/} Indeed, even if taken at face value, the MO&O's proffered rationale is factually wrong in two respects. First, the "useful purpose"

^{7/} See, e.g., Quannah, TX et al., MM Docket No. 00-148, "Request for Supplemental Information," released January 18, 2002 (DA 02-158).

^{8/} The fact that the staff conducted its own study after the Comment and Reply Comment deadlines had passed also meant that neither BBI nor the public at large had any opportunity to comment on the FCC's study prior to the release of the staff's Report and Order.

^{9/} See, e.g., Marin TV Services Partners, Ltd., 936 F.2d 1304, 1309 (D.C. Cir. 1991).

that would have been served, by not unlawfully relieving Alpine of its burden of proof, would have been fidelity to the FCC's own rules and the requirements of the NPRM in this proceeding. ^{10/} Second, it is fatuous to claim that the staff relieved Alpine of its evidentiary burden so as not to "delay" this rulemaking proceeding; ^{11/} this proceeding was delayed for more than three years! ^{12/} Requiring the petitioner to carry its assigned burden of proof in this case would have added, at most, another month or two to a proceeding that already had spanned nearly 40 (forty) months. ^{13/} In short, the agency has failed to present a reasoned basis for relieving petitioner of its required evidentiary burden in this proceeding.

II. THE DECISIONS UNLAWFULLY AUTHORIZE KSIL-FM TO ABANDON SIGNIFICANT "GRAY AREA" SERVICE IN IDAHO

Alpine's petition proposed to delete its unbuilt Class C facility at Wallace, ID and to reallocate that unbuilt FM facility from an underserved area in Idaho to a well-served area in Mon-

^{10/} See 47 CFR 1.401(c); NPRM, supra.

^{11/} In the pending Quanah rulemaking proceeding, supra, the FCC issued a Request for Supplemental Information after the proceeding had been pending for approximately two years.

^{12/} The Petition for Rulemaking was filed on February 24, 1998, but the staff's initial decision was not released until May 11, 2001 -- more than three years.

^{13/} In the Quanah proceeding, supra, the staff's "Request for Supplemental Information" set a deadline of less than 45 days for the Petitioner's submission of the required evidentiary data.

tana. ^{14/} After BBI filed an Opposition in this rulemaking proceeding, which showed that significant "white and gray areas" would be unlawfully abandoned in Idaho if Alpine's requested reallocation were granted, Alpine responded by filing a one-step application to downgrade its unbuilt station at Wallace, ID, from a Class C to a Class C-2 facility. ^{15/} While Alpine's downgrade of its Idaho facility (which it wanted ultimately to move) did reduce somewhat the extent of the "loss area" for purposes of its pending rulemaking, it did not eliminate the "gray area" problem for Alpine. ^{16/} Even the Decisions are compelled to acknowledge that at least 150 persons in the Idaho loss area "would no longer receive a second aural service." R&O, at para. 10. Moreover, the R&O conceded that at least one quarter of KSIL's existing Idaho service area is already underserved. Id. at para. 8.

To maximize radio service in underserved areas is not only a statutory mandate ^{17/} but long has been the highest priority in FCC rulemaking proceedings. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 (1982). In this proceed-

^{14/} Alpine's own evidence shows that the "gain area" in Montana was already well-served by six (6) FM stations and four (4) AM stations. See Figure 2 to Comments of Alpine Broadcasting, LP, filed October 26, 1998.

^{15/} KSIL-FM became licensed approximately one year ago as a C-2 facility. See BLH- 20001215AAZ, granted March 13, 2001.

^{16/} A proposed downgrade in service to the public ordinarily must be justified by an applicant. See Triangle Publications, 37 FCC 307, 313 (1964)

^{17/} See 47 USC 307(b).

ing, the Decisions both attempt to justify the loss of a second aural service to 150 persons ("gray area") by claiming it is "de minimis" (R&O at para 10; MO&O at para. 4). It is a sufficient rebuttal of the that purported justification to note that, on reconsideration, the staff chose to ignore BBI's pointed reliance on another recent rulemaking case -- involving the same community of Wallace, ID -- where the FCC denied a proposal to move an FM facility from the underserved area of Wallace, ID to a well-served suburb of another Montana city because, inter alia, it would deprive persons in a "gray area" of a second aural service. See Wallace, Idaho and Lolo, MT (MM Docket No. 97-203), released November 30, 1999. Nor did the MO&O, on reconsideration, explain the staff's departure in this proceeding from other recent cases,^{18/} cited in BBI's Petition for Reconsideration, where the FCC has denied proposals to move an FM station out of underserved areas.

Over ten years ago, the Commission noted that there are virtually NO areas of the country left with only one or two aural services. See Change of Community, 5 FCC Rcd 7094, 7096 (1990). The staff's unreasoned departure from precedent in this case, its authorization of a station's move from an underserved area into a well-served area and its sacrifice of the Section 307(b) rights of at least 150 persons in Idaho is arbitrary and unlawful.

^{18/} See, e.g., Pecos and Wink, TX (MM Docket No. 97-235), released February 12, 1999, cited in BBI's June 11, 2001 Petition (at 5).

III. THE DECISIONS UNLAWFULLY GRANTED A PROPOSAL TO REALLOCATE A CHANNEL THAT WAS NOT EVEN IN THE TABLE OF ALLOTMENTS

Because of Alpine's gamesmanship, its 1998 rulemaking proposal -- which was never amended, changed or counterproposed -- resulted in a convoluted, three-year-long proceeding where the staff ultimately authorized the reallocation, to a new community, of an FM channel that was not even in the FM Table of Allotments. In the end, Alpine's machinations in this bizarre rulemaking proceeding were too clever by (at least) half. ^{19/}

On February 24, 1998, Alpine filed its Petition for Rulemaking, seeking the reallocation to Bigfork, MT of its unbuilt channel 264C facility at Wallace, ID. After BBI filed an Opposition showing significant "white" and "gray" areas in Idaho that would be adversely impacted by Alpine's proposed move of its unbuilt facility to a well-served area of Montana, Alpine filed a Form 301 "one-step" application with the Audio Services Division to downgrade its (unbuilt) Idaho facility. Under the FCC's "one-step" procedures (where rulemaking and modification proceedings can be accomplished in one Form 301 filing), Alpine was granted a CP and the FCC's Table of FM Allotments was changed to reflect the allotment of channel 264C2 at Wallace, ID. ^{20/} Thus, on

^{19/} Alpine's successor, Anderson, likewise has erroneously filed a Form 301 modification application for a permit to construct a channel 264C-1 facility at Bigfork, MT, even though the Table of Allotments was amended in the instant rulemaking proceeding, at Alpine's request, to add channel 264C at Bigfork.

^{20/} The CP for ch. 264C2 at Wallace, ID was issued to Alpine on August 24, 2000 and ch. 264C at Wallace, ID was deleted.

August 24, 2000, channel 264C at Wallace was deleted from the FM Table of Allotments and, as a matter of law, the subject matter of the underlying rulemaking proposal no longer existed.

Yet, no change to Alpine's February 24, 1998 Petition -- seeking the reallocation of a "Class C" facility at Wallace, ID -- was ever made by the Petitioner. Thus, when the staff's R&O purported to amend the FM Table of Allotments in May 2001, by reallocating channel 264C from Wallace, ID to Bigfork, MT, there was no channel 264C allocation at Wallace in the FM Table. As BBI argued in its Petition for Reconsideration, this error was the logical result of Alpine's failure to amend its rulemaking proposal -- to reflect the fact that channel 264C at Wallace no longer existed -- and directly violated Section 1.401c of the Rules. See 47 CFR 1.401(c) (petition must set forth the substance of the proposed amendment and shall indicate how petitioner will be affected). The substance of Alpine's proposal changed but the petition was never amended to set forth that change. As a result, the R&O authorized the reallocation of a channel that did not exist in the FM Table of Allotments. ^{21/} On reconsideration, this matter was not even addressed by the staff's MO&O.

^{21/} The R&O departs from the NPRM in this proceeding in a manner that attempts to "finesse" this problem. Rather than showing the deletion of channel 264C at Wallace, as did the NPRM, the R&O conveniently shows only the reallocation of channel 264C to Bigfork and the presence in the Table of Allotments of a remaining FM channel at Wallace. See R&O, supra, at para. 12.

IV. THE DECISIONS UNLAWFULLY DEPRIVED THE PUBLIC OF ANY OPPORTUNITY TO COMMENT ON THE CHANGED PROPOSAL

It long has been established that the public must be given notice of the EXACT change in rules proposed by a Petition for Rulemaking. See NBMC v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986); see generally Lafayette, LA, 4 FCC Rcd 5073 (1989). In this rulemaking proceeding, the required notice was not given because the proposal made in Alpine's February 24, 1998 Petition for Rulemaking was NOT the same proposal granted by the Decisions.

As the NPRM in this proceeding expressly noted,^{22/} Petitioner proposed to delete channel 264C at Wallace, ID and reallocate it to Bigfork, MT. Id. at para. 9. The public was invited by that NPRM to comment on or file Counterproposals against THAT proposal.

After BBI filed timely comments that raised serious questions about the loss of service to "white and gray" areas of Idaho should the reallocation of channel 264C from Idaho to Montana be granted, Alpine responded by filing a "one-step" application with a different branch of the FCC, seeking to downgrade its (still unbuilt) Wallace, ID facility from Class C to Class C-2. In downgrading by two classes of service before constructing its Wallace, ID facility, Alpine reduced the scope of its service to "white and gray" areas of Idaho, thus "gaming" the adverse impact of its pending rulemaking proposal -- which was to abandon service in Idaho altogether. While such gamesmanship did not solve

^{22/} See Notice of Proposed Rulemaking, supra, at paragraphs 1 and 9.

Alpine's "white and gray" area problem completely (see Argument II, supra), it created a much bigger problem in the rulemaking proceeding itself. By never amending its Petition to reflect the change required by the gamesmanship, Alpine was left with a defective proposal -- one that reflected Alpine's request to delete (the new) channel 264C2 at Wallace, ID. Moreover, Alpine's gamesmanship (and its failure to amend its proposal to delete channel 264C at Wallace) resulted in the public never having any opportunity to comment on a rulemaking proposal that involved channel 264C2 at Wallace.

On reconsideration, the staff's only response to this serious issue is the non-sequitur that the public did have an opportunity to comment on the one-step downgrade application. MO&O, supra, at para 4. Of course, that misses the point entirely. It is the public's right to comment in this rulemaking proceeding that is at issue. As BBI noted in its Petition for Reconsideration (at 7-8), this is no "harmless error." The NPRM gave notice of a proposed deletion of channel 264C at Wallace. By the time the FCC acted in this rulemaking proceeding, however, there was no channel 264C at Wallace. The public had a right to notice of the changes and the opportunity to file a comment regarding the extent of loss of "white or gray" area service; ^{23/} or, with proper notice that the Petitioner proposed to delete only a Class C-2 facility at Wallace (rather than a full Class C facility),

^{23/} By relieving the Petitioner of its evidentiary burden in this respect, the record was already unlawfully limited. See Argument I, supra.

the public might have been motivated to file a Counterproposal. Indeed, the technical parameters involved in the relocation of a Class C-2 channel are substantially different from those of a Class C channel; they involve a different set of public interest choices. The public was effectively cut off in this proceeding from examining and/or commenting on the public interest benefits of the relocation of FM channel 264C2 at Wallace, ID.

It is also noteworthy that the MO&O was silent with respect to BBI's contention that, after Alpine's downgrade of its Wallace facility, the FCC erred in failing to issue a further notice of rulemaking (giving notice of the change) and affording the public an opportunity to comment on the changed proposal. See 47 CFR 1.421. Where, as here, no notice of a change to a rulemaking proposal is given, the public is unlawfully denied any meaningful opportunity to comment.

Conclusion

The Application for Review should be granted, the Decisions should be set aside, the rulemaking proceeding should be reopened, the public should be given an opportunity to comment and the Commission should reach a new decision.

Respectfully submitted,



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Certificate of Service

I, Robert Thompson, do certify that on this 8th day of March, 2002, I caused to be served by first class mail, prepaid, a copy of the foregoing Application for Review on counsel of record:

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March 8, 2002